83-298

Office-Supreme Court, U.S.
FILED
AUG 19 1983
ALEXANDER L. STEVAS,
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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1983

JOSE FIGUEROA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Questions Presented for Review.

1. Whether this Court's decision in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 102 S.Ct. 2858 (1982), which held that Congress may not constitutionally authorize the trial of proceedings relating to Bankruptcy before judges who are not protected by the life tenure and salary clauses of Article III, precludes the federal government from prosecuting citizens on federal criminal charges under the United States Code, before judges also lacking the protection of life tenure and salary guarantees of Article III, within the United States Territories.

2. Whether a United States citizen may be charged and tried on a federal criminal offense of nationwide application before a judge appointed for a term of eight years and not enjoying the salary protections of Article III in a prosecution commenced by the Department of Justice, where the geographical location of the trial is within one of the United States Territories.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Jose Figueroa, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on May 31, 1983.

OPINION BELOW.

The opinion of the Court of Appeals below (Appendix A, *infra*, page 1) was filed on May 31, 1983 and has not yet been reported. The opinion of the District Court below (Appendix B, *infra*, page 8) was not reported.

JURISDICTION.

The judgment of the court below (Appendix C, *infra*, page 26) was entered May 31, 1983, and rehearing was denied on June 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

1. Article III, Sections 1 and 2, United States Constitution:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the

Trial shall be at such Place or Places as the Congress may by Law have directed."

2. 18 U.S.C. §1001, under which petitioner was prosecuted which provides as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or devise a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT.

The facts relevant to the issues raised in this petition are briefly as follows:

A. The Course of Proceedings.

On May 3, 1982, the United States of America charged Jose Figueroa and a co-defendant, Orlando Canel, with a series of federal criminal offenses in a thirteen count information,[1] filed in the District Court of the Virgin Islands. The defendants, after trial to a jury, were convicted before a presiding judge appointed for a term of eight years, of offenses under five counts and acquitted of offenses under two counts of the information, the Court having dismissed certain charges at the conclusion of the government's evidence. The petitioner was convicted under 18 U.S. Code §1343, §2314 and §1001. The District Court entered judgment and commitment on November 15, 1982, imposing a

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[1]The parties to the proceeding below were the two above-named co-defendants and the United States.

ninety day period of incarceration, a nine month period of enforced unpaid community service to the Territory in the capacity of a hospital orderly or kitchen helper, and a fine of $30,000. A post-trial motion was filed asking the District Court to enter judgment of acquittal notwithstanding the verdict, or in the alternative to grant a new trial, relying in part on the issues raised in this petition. That motion was denied. The trial court's judgment and sentence was affirmed by the Court of Appeals for the Third Circuit in *U.S.A. v. Jose Figueroa*, Appellant, No. 83-3004, on May 31, 1983, and a petition for rehearing en banc was denied by the same court on June 23, 1983. Petitioner then filed this petition for writ of certiorari asking this Court to consider the questions posed herein for review.

B. Relevant Facts Concerning the Conviction.

The petitioner was charged by the United States Attorney with having committed two series of offenses in 1976 and 1977, along with his co-defendant, Canel. The charges alleged that the two conspired to cause a public road adjacent to property owned by petitioner to be cleared at public expense, and that in the course thereof improvements in or to the value of the petitioner's property resulted. It was also alleged in a separate set of counts in the information that the same two persons conspired together to cause the sale of a vehicle to the government of the Virgin Islands at a price and under circumstances involving misrepresentations concerning the capacity in which petitioner offered them for sale, specifically suggesting that he fraudulently induced the government to believe that he made the sale in the capacity of a bankruptcy trustee whereas, in fact, he was acting as a private individual. At the time of these offenses, co-defendant Canel was an employee of the government of the Virgin Islands. At the conclusion of the government's

case the counts relating to the road construction were dismissed, and those relating to the sale of the vehicle were submitted to the jury with the resulting verdict of guilty on certain counts and not guilty on others having been entered.

REASONS FOR GRANTING THE WRIT.

A. The Court of Appeals Has Decided an Important Federal Question in a Way in Conflict With an Applicable Decision of This Court.

On May 3, 1982, the United States Government filed, under the United States Code, the criminal charges here involved against Jose Figueroa, a United States citizen resident in Puerto Rico. Those charges were filed in the District Court of the Virgin Islands, Division of St. Thomas and St. John, alleging that certain misconduct on the part of the defendant had occurred in that Territory giving that court jurisdiction over the matter. Accordingly, the defendant was required to leave his home in Puerto Rico and travel to the Virgin Islands to submit to trial. Less than two months later, on June 29, 1982, this Court entered its opinion in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 102 S.Ct. 2858, holding that Congress may not constitutionally authorize the trial of proceedings relating to bankruptcy before judges who are not protected by the life tenure and salary clauses of Article III. The *Northern Pipeline* decision in considering the authority of Congress to create what have been referred to as "legislative courts" under Articles I or IV of the Constitution, recognized that historically Congress had been conceded the right in "certain geographical areas in which no state operated as sovereign, . . . to exercise the general powers of government." In effect, the federal government was, in those cases, entitled to act both as federal and state sovereign. *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 242. However, while recognizing those decisions, the Court emphasized that the permissible exceptions to the constitutional grant of protection in Article III must be carefully analyzed and properly applied. The Court observed that the requirements of Article III are ap-

plicable ". . . where laws of national applicability and affairs of national concern are at stake." Thus, while Congress may be free under the authority of Articles I or IV to create a territorial court functioning, in effect, as the equivalent of a state judiciary, it does not follow that Congress may arbitrarily subject those of its citizens who happen to reside in or pass through the unincorporated territories to trial on federal criminal charges of national applicability before judges not subject to the protections of Article III.

> "(W)hen these three exceptional grants [Territorial Courts, Courts Martial, and Administrative Adjudication of Public Rights] are properly constrained, they do not threaten the Framers' vision of an independent federal judiciary. *What clearly remains subject to Article III are* all private adjudications in federal courts within the States — matters from their nature subject to 'a suit at common law or in equity or admiralty' — *and all criminal matters*, with the narrow exception of military crimes. There is no doubt that when the Framers assigned the 'judicial power' to an independent Art. III branch, these matters lay at what they perceived to be the protected core of that power." *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 102 S.Ct. at 2871, n. 25 (emphasis added).

The implications of the *Northern Pipeline* decision for continued federal prosecution of citizens in courts created by the United States government with judges limited to terms of eight years and subject to removal or salary adjustment without the protections of Article III was immediately evident. Nevertheless, on September 20, 1982, less than three months after the *Northern Pipeline* decision was entered, the United States government proceeded to trial against the defendant on these federal charges, in the District Court of the Virgin Islands, before a judge holding a term of eight years who had been appointed by the President of the United

States and was subject to reappointment only upon the pleasure of the Chief Executive.

The district court and the Third Circuit agreed that the controlling authority on the issue raised was *American Insurance Company v. Canter*, 26 U.S. (1 Pet.) 242. That decision, dated 1828, concerned an action in admiralty, filed in the district court of South Carolina, which challenged a sale of bales of cotton conducted upon decree of a court created by an Act of the Territorial Legislature of Florida in the then Territory of Florida. There a territorial statute purported to give authority to a territorial court consistent with the court's decree. The Supreme Court concluded that the judicial sale was valid if the territorial legislature was competent to enact the statute. Although the *Canter* decision did consider whether it was constitutional for the legislature of the Territory of Florida to create courts authorized to hear matters in admiralty — normally a subject of federal jurisdiction — it certainly did not decide the question here raised, namely whether a United States citizen may be put to trial on federal criminal charges in a court created by the United States government, presided over by a judge appointed by the federal Executive for a limited term of years, lacking the protection mandated by Article III of the United States Constitution. *Canter* is cited below for the proposition that admiralty jurisdiction having been held properly subject to the jurisdiction of a territorial court lacking Article III characteristics, federal criminal jurisdiction must similarly be subject to such jurisdiction, but that conclusion does not necessarily follow.

Canter was the apparent genesis of the distinction between "constitutional" and "legislative" courts. But the Chief Justice there did not say that Congress could create "legislative courts" in the territories without constitutional limitations. He said these courts, having judges appointed

only for a term of years, were not those ". . . in which the judcial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it." *Id.* at 247.

Indeed, the Court seemed to conclude that the right of the territorial legislature to treat the subject of salvage or admiralty arose not by federal enactment but by residual authority of the former sovereign, Spain. The act of Congress which established the territorial government of Florida in 1823 contained two sections of note. The 7th section vested judicial power over criminal cases and civil cases "arising under the laws of the territory then in force or later enacted" in two superior courts and such inferior courts as the territorial legislature might establish. The 8th section gave jurisdiction over cases arising under the laws or Constitution of the United States solely to the superior courts. Chief Justice Marshall had no difficulty in concluding that *Canter* involved the 7th rather than the 8th section:

> "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise." 26 U.S. at 246.

Thus, the Court apparently concluded it was the reference to "laws of the territory now in force," meaning the residue of Spanish law on the subject of salvage, which formed the legitimate basis for the Florida court to act.

This opinion, somewhat difficult to read in an age far removed from the heavy English influence on legal writing and the historical views of the early eighteen hundreds, was written originally to *affirm* authority in the territories to act in a sovereign way unless expressly displaced by congressional enactment. Now, it is incorrectly cited as the overriding authority for denying citizens in the few off-shore

territories remaining the right to the fundamental protections from federal abuse of the judicial process which Article III provides.

In summary, *Canter* should be construed to mean that where a court is created by Congress in the Territories without Article III attributes, it cannot be granted the judicial power conferred by the Constitution only upon such courts — and that power at a minimum must include trial under a federal criminal statute of national application. This interpretation would reconcile *Canter* and *Northern Pipeline* while advancing the purpose of Article III and reviving its logical and literal meaning.

B. The Court of Appeals Has Decided an Important Question of Constitutional Law Which Has Not Been, but Should Be, Settled by This Court.

So far as our research has revealed, the United States Supreme Court has never had occasion to decide the precise issue raised here. The decision which most closely approaches the issue may be *Palmore v. The United States*, 411 U.S. 389 (1972). However, *Palmore* also determined a materially different question. There the appellant had been convicted of a felony under the District of Columbia Code in the Superior Court of the District of Columbia. The District of Columbia Code is an enactment of Congress applicable *only* within the geographical confines of the District. Moreover, the Superior Court of the District of Columbia constitutes a strictly local court created by Congress to hear matters unique to the District. There is a separately constituted District Court for the District of Columbia which hears federal criminal charges under statutes of national application and in which judicial appointments are made consistent with Article III of the Constitution. Thus, in finding that Palmore was not subjected to unconstitutional treatment

in his D.C. Superior Court trial, the Supreme Court did not resolve the question whether he could have similarly been tried in that court on a federal statute of nationwide applicability. The *Palmore* Court said:

> "We hold that under Article I §8 Clause 17, power to legislate for the District of Columbia, Congress may provide for trying local criminal cases before judges who, in accord with the District of Columbia Code, are not accorded life tenure and protection against reduction in salary. In this respect, the position of the District of Columbia defendant is similar to that of the citizen of any of the 50 states when charged with violation of a state criminal law; neither has a Constitutional right to be tried before judges with tenure and salary guaranteed." 411 U.S. at 390-391.

Although the *Palmore* Court was satisfied that Congress had Constitutional power to proscribe certain criminal conduct only in the District and to select the appropriate Court, whether it is created by virtue of Article III or Article I, to hear and determine these particular criminal cases within the District, the Court did not hold that the same would apply with respect to Congressional proscription of criminal conduct in a national enactment. *Palmore* repeatedly emphasized that the District of Columbia Code, there in issue, applied "only within the boundaries of the District of Columbia" (at p. 395) and that the Superior Court whose jurisdiction was at issue was vested with authority to "hear criminal cases involving alleged violations of the criminal laws applicable only to the District of Columbia" (at p. 398). Although dicta in various portions of the opinion may be adverse to principles urged in this appeal, the majority opinion in summarizing its conclusion stated the distinction upon which we submit this Court should premise its analysis of the issue here presented:

> "We do not discount the importance attached to the tenure and salary provisions of Article III, but we conclude that Congress was not required to provide an Article III Court for the trial of criminal cases arising under its laws applicable *only* within the District of Columbia . . . Palmore was no more disadvantaged and no more entitled to an Article III judge than any other citizen of any of the 50 states who is tried for a *strictly local crime*. Nor did his trial by a non-tenured judge deprive him of due process of law under the Fourteenth Amendment." 411 U.S. at 410 (emphasis added).

The various portions of *Palmore* here highlighted invite this Court to consider whether it is not now an appropriate time to reach the question of the Constitutional entitlement of a defendant in an American territory charged with violation of a nationwide federal criminal statute, to trial before a judge accorded the minimum protection described in Article III of the Constitution.

While *Northern Pipeline* does not directly address the issue here raised, much of its reasoning and language is supportive of the appellant's position. In first analyzing the basic Constitutional structure established by the framers of the Constitution, the Court noted that "the Federal Judiciary was . . . designed by the Framers to stand independent of the Executive and Legislature — to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial." 102 S.Ct. at 2864-2865. Quoting from Hamilton's Federalist Papers, the Court added:

> "Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an

> improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws." *The Federalist* No. 78, p. 489 (H. Lodge ed. 1888).

Article III first defines and then protects the independence and authority of the judicial branch of the Federal Government. The language of the Article recites that "(t)he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." As the *Northern Pipeline* Court summarized it,

> "the inexorable command of this provision is clear and definite: the judicial power of the United States must be exercised by courts having the attributes prescribed in Article III. Those attributes are also clearly set forth:
>
> > 'The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.'
>
> The 'good behavior' Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment. *Toth v. Quarles*, 350 U.S. 11, 16 (1955)." 102 S.Ct. at 2865.

Furthermore, Section 2 of Article III expressly states that as to its application to crimes, the trial may be within *or* outside of the states of the Union.

Both *Northern Pipeline* and *Palmore* emphasize the applicability of the requirements of Article III "where laws of national applicability and affairs of national concern are at stake." The distinction between the federal government's

right to act as local sovereign, free of its Article III constraints, to legitimately create a local judiciary to preside over local affairs and enforce or adjudicate statutes of local application only, and the clear limits imposed by Article III when the federal government acts as national sovereign, is crucial to *Palmore* and other decisions of similar import concerning the so-called legislative courts in the territories. See *Swain v. Pressley*, 430 U.S. 372 (1977).

Moreover, it was "(t)he general plan of the framers (of the Constitution), . . . that the exercise of the federal judicial power including the construction of the whole range of federal law, be confided to the tenured judiciary." *Harv. Law Rev.* Vol. 96:62, at p. 266, "The Supreme Court 1981 Term," *The Federalist* No, 80 (A. Hamilton). That purpose is compromised in the territories where the executive and legislative branches of the federal government have been allowed to create and staff federal courts, interpreting, applying and construing federal statutes of national import, with judges granted only eight year terms and no protection from the attempted influence of the other branches of government.

It might be suggested that this procedure is historically sustained by the fact that in the nineteenth century state courts heard what are now federal questions and their judges often lacked life tenure and salary protection. But this argument overlooks the inherent protection of a state judiciary from the need for federal executive approval to earn reappointment in its home state. In the territories, however, that insulation is absent. The judges presiding over trials of federal prosecutions are directly appointed and reappointed by the President (so long as he and the Department of Justice approve of their "performance"), and confirmed by the Congress. *Cf. Harv. Law Rev.* Vol. 96:62, p. 266 n. 60. The federal judiciary in the territories needs the protection

of Article III as much as do the citizens and residents of those areas.

Indeed, in the Territory of the Virgin Islands, the threat which the Constitutional Framers intended to avoid, of Executive and/or Legislative attempts to influence the judiciary, is a reality and not a mere legal theory. Although the court reporter did not transcribe the proceedings on the post-trial motions, in argument to the district court below, one example of that threat was noted and acknowledged by the court. Several years ago a sitting District Court judge in the Virgin Islands, appointed for a term of years, whose consideration for reapportionment was before the Federal Executive Branch of government, was the subject of undisguised lobbying by the Department of Justice to block his reappointment on the grounds that the Department did not approve of or agree with his decisions in criminal matters during his first term in office. Whether and to what extent this open lobbying may have affected the judicial candidate himself or others holding or later to hold judicial offices in the Territory may never be known, but the only protection against such influence must be that set forth in Article III.

Legal scholars have been critical of the implicit exclusion of citizens in the territories from the protections of Article III for a number of years. Charles Allen Wright wrote in his treatise "Law of Federal Court", (Horn Book Service, Second Ed. West Publishing Co. 1970) on the subject of "Constitutional" and "Legislative" courts:

> "Whether the necessity that is thought to have required the development in 1828 of the concept of 'legislative' courts for the territories still exists may well be questioned. If judicial independence is of vital importance in the states, it is hard to see why it is not equally valuable in the territories. The district judges there try persons for crimes against the United States. They hear

> civil cases in which the United States is a party. They should be able to decide such cases fearlessly and impartially, without being dependent upon the Department of Justice for their continued tenure. Unfortunately, instances are not unknown of territorial judges who have not been reappointed, under circumstances where it appears they have been denied reappointment because of decisions displeasing to the appointing authority. So long as these judges have limited tenure, the possibility of such abuse, or apparent abuse will persist. The granting to these judges of tenure during good behavior, as was recently done for Puerto Rico, would bring an end to the dubiously-conceived notion that courts of the United States can be other than 'constitutional'." ("Law of Federal Courts" at p. 34, citations omitted.)

The "legislative" courts in the territories referred to by Professor Wright are now only in Guam and the Virgin Islands. It is, nevertheless, a matter of significance for this Court to carefully consider the Constitutional rights of those citizens residing in the Virgin Islands and Guam.

The only Circuit Court decision found which directly decides the question whether a United States citizen may be subjected to trial on federal criminal charges in a Territorial Court before a judge appointed for a term of years arose out of the Canal Zone. The Fifth Circuit in the case of *Government of The Canal Zone v. Scott*, 502 F.2d 566 (5th Cir. 1974) held that the appellant was not denied due process or equal protection of the laws where his trial was presided over by a non-tenured judge sitting as a so-called "legislative" rather than a "constitutional" (Article III) court. *Cf. U.S. v. Montanez*, 371 F.2d 79 (2nd Cir. 1967). In support of its brief analysis of that issue. the court noted that "a system suitable for a Territory that is a candidate for statehood may be inappropriate for an area under the

jurisdiction of the United States by virtue of a treaty between this country and the Republic of Panama, a treaty that is at this point being renegotiated." 502 F.2d at 570. Certainly that analysis would not apply to the United States Virgin Islands which has been an unincorporated Territory of the United States since 1916, and which owes its allegiance to the federal government through no treaty which is subject to renegotiation. Indeed, there is every reason to believe that the United States and the Virgin Islands will remain in close association indefinitely.

This is to suggest that the national circumstances underpinning a particular judicial construction of a constitutional provision may vary and thus vary the judicial conclusion. In *Glidden Co. v. Zdanok*, 370 U.S. 530, 545-548 (1962), the Court said that in the cases concerning the territories and their courts there has been a "need to exercise the jurisdiction then and there for a transitory period . . . when the peculiar reasons justifying the investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlling." *O'Donoghue v. United States*, 289 U.S. 516, 536-539. The requirements which originally justified the "territorial exception" acknowledged by the court in *Northern Pipeline*, are not to be found in the Virgin Islands. Thus, even if the *Northern Pipeline* decision had not excepted federal criminal charges from the otherwise tolerated Article III exceptions, the continued trial of cases such as this before non-constitutional courts in the Virgin Islands would be constitutionally outmoded. The United States Virgin Islands have been an unincorporated territory of the U.S. since 1916, and there is no indication that the Virgin Islands will exist as a U.S territory for a "transitory period."

In *Glidden* the court also stated "(w)hether constitutional limitations on the exercise of judicial power have been held

inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives." *Glidden Co. v. Zdanok*, 370 U.S. 530, 547 (1962). There have not been any articulations by Congress or the courts as to what are the "practical necessities" which dictate that judges in the Virgin Islands cannot be granted Article III status. Given that there seems to be no other justification for having limited tenure judges in the territory, it thus follows that the *Canter* holding should not be deemed controlling in the case at hand.

None of the cases cited dispose of the question before this Court with finality. However, the language cited from *Northern Pipeline* and the distinctions drawn in that and other cases now invite a determination by this Court that in the United States Virgin Islands, citizens are entitled to that minimum assurance of judicial impartiality and independence conferred by Article III of the Constitution.

CONCLUSION.

The judgment below elevates a long-standing but unwarranted misinterpretation of an 1828 decision over recent well-reasoned opinions of this Court, recognizing the extraordinary importance of the simple protection in Article III of our Constitution: the judicial branch of the United States should be free from the threat of influence or pressure from the other branches of government, for all citizens require the security that an independent judiciary provides. This is no less true of those in the small islands which are the outskirts of America.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeals.

United States Court of Appeals for the Third Circuit.

United States of America v. Orlando Canel, Appellant. (D.C. Crim. No. 82-72-01). No. 83-3003.

United States of America v. Jose Figueroa, Appellant. (D.C. Crim. No. 82-72-02). No. 83-3004.

On Appeal from the District Court of the Virgin Islands, Division of St. Thomas and St. John.

Argued: April 28, 1983.

Before: Gibbons, Sloviter and Becker, Circuit Judges.

(Opinion Filed: May 31, 1983).

Gibbons, *Circuit Judge*.

Orlando Canel and Jose Figueroa appeal from judgments of sentence imposed following their conviction, in a jury trial in the District Court of the Virgin Islands, of violations of 18 U.S.C. §371 (1976) (conspiracy), 18 U.S.C. §2314 (1976) (transporting in commerce checks obtained by fraud), 18 U.S.C. §1343 (1976) (wire fraud), and 18 U.S.C. §§1001 and 2 (1976) (false statements to an agency of the United States). Their principal contention on appeal is that they could not constitutionally be tried in the District Court of the Virgin Islands for violations of federal criminal statutes of general application. They also make several objections to the sufficiency of the evidence and the manner in which the trial was conducted. We affirm.

I.

The charges of which Canel and Figueroa were convicted arose out of purchases of two truck-tractors by the Government of the Virgin Islands, Division of Roads and Highways. Mr. Canel was the Director of that Division at the time of the purchase, and Mr. Figueroa was the seller. The

trucks were formerly owned by Tri-County Truck Sales, a bankrupt Puerto Rico company. In essence the fraudulent scheme involved representations to various officials of the Virgin Islands Government that Figueroa was the "administrator" of the bankrupt company, and that by dealing with him instead of soliciting competitive bids the Government would be obtaining the vehicles at "rock bottom prices." In fact, Figueroa had no connection with the administration of the bankrupt company, but purchased the trucks from it at prices significantly lower than the prices charged the Government. Canel and Figueroa succeeded in convincing Virgin Islands officials that normal purchasing practices should be bypassed in order to prevent the "administrator" from disposing of the bargain trucks elsewhere.

II.

Canel and Figueroa make two distinct challenges to the power of the District Court of the Virgin Islands to try them for violations of Title 18 of the United States Code, neither of which has merit. The first is that only an Article III judge may preside at the trial, anywhere, of a charge of violation of the criminal laws of the United States of general application. The second is that the trial of a criminal charge before a judge enjoying the limited tenure afforded to judges of the District Court of the Virgin Islands violates due process.

A. *The Article III Contention*

The appellant's argument that life-tenured judges must preside at criminal trials under federal criminal statutes of general application is predicated upon the recent opinion of the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 102 S.Ct. 2858 (1982), which holds that Congress may not, within the territory of the several states, constitutionally authorize the trial of pro-

ceedings relating to bankruptcy before judges who are not protected by the life tenure and salary clauses of Article III. The appellants read far too much into *Northern Pipeline*, however, for it casts no doubt upon the continued vitality of *American Insurance Co. v. Canter*, 26 U.S. 388 (1 Pet.) (1828), holding that Congress has Article I legislative authority to select courts having limited tenure for the territories over which the United States maintains sovereignty. Indeed the Court expressly noted in *Northern Pipeline* that the "[territorial courts] exception from the general prescription of Article III dates from the earliest days of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government." ___ U.S. at ___, 102 S.Ct. at 2868. The general powers of government include the power to choose appropriate judicial tribunals.

In *Palmore v. United States*, 411 U.S. 389 (1973), and *Swain v. Pressley*, 430 U.S. 372 (1977), the Court recognized the sovereign power of Congress to provide for term-tenured judges in the District of Columbia by virtue of the grant of legislative authority over that territory in Art. I, §8, cl. 17 of the Constitution. Congressional sovereign power under Art. IV, §3, cl. 2 is at least as broad. Appellants urge that the *Palmore* and *Pressley* cases are distinguishable, in that they dealt with the provisions in D.C. Code Ann. §11-923 (Supp. V 1972) of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, which gives the term-tenured judges of the Superior Court of the District of Columbia jurisdiction in criminal cases involving alleged violations of the criminal laws applicable only to the District of Columbia. The life-tenured judges of the United States District Court retain juisdiction over offenses in violation of federal statutes of

general jurisdiction. D.C. Code Ann. §11-502 (Supp. V 1972).

We recognize the distinction. We note, however, that Congress has made no provision for a United States District Court for the Virgin Islands. It has only provided for a District Court of the Virgin Islands. *See United States v. George*, 625 F.2d 1081, 1087-88 (3d Cir. 1980). In the Organic Act for the Virgin Islands, Pub. L. No. 95-598, 92 Stat. 2680, it has conferred on that court "the jurisdiction of a district court . . . of the United States in all causes arising under the Constitution, treaties and laws of the United States. . . ." 48 U.S.C. §1612 (1976 & Supp. V 1981). Moreover, in 18 U.S.C. §3241 (1976) it has provided that the "District Court of the Virgin Islands shall have jurisdiction of offenses under the laws of the United States, not locally inapplicable, committed within [its] territorial jurisdiction." We have consistently held that the District Court of the Virgin Islands may exercise that jurisdiction. Indeed *United States v. George*, 625 F.2d 1081, is such a case. Were we to hold that Title 18 could not be enforced in the District Court of the Virgin Islands, the entire title would be for all intents and purposes a dead letter in the territory. Obviously in making provisions for the exercise in the Virgin Islands of the jurisdiction, civil and criminal, of United States District Courts, Congress assumed that it had the plenary sovereignty recognized in *American Insurance Co. v. Canter*.

Recognizing that *Northern Pipeline* must realistically be read as a disavowal by the majority of some of the more expansive statements in Justice White's *Palmore* opinion respecting congressional power to dispense with Article III judges in sanctioning contexts, we find nothing in it suggesting any erosion of the *Canter* holding. Congress obviously could, as it has in the District of Columbia and

Puerto Rico,[1] provide for life-tenured judges for federal as distinct from local matters. Outside the geographical limits of the states which are members of the federal union, however, the tenure and compensation guarantees of Article III, section 1 have been for too long recognized to be matters of legislative grace rather than constitutional right for this court to hold otherwise. Other courts which have explicitly considered the question have reached the same conclusion. *See Government of the Canal Zone v. Scott*, 502 F.2d 566, 570 (5th Cir. 1974); *United States v. Montanez*, 371 F.2d 79 (2d Cir. 1967), *cert. denied*, 389 U.S. 884 (1967).

B. *The Due Process Contention*

The appellants predicate their due process contention on 48 U.S.C. §1614(a) (1976), which provides that the judges of the District Court of the Virgin Islands "shall hold office for terms of eight years . . . unless sooner removed by the President for cause." They point out that nowhere in the Organic Act or elsewhere is cause for removal defined. Thus, they urge, the judges of the district court are at all times subject to the possibility that the federal executive may attempt to apply the removal provision in section 1614(a) in an arbitrary manner. Moreover, even if the President leaves the judge alone during the term, there is always the problem of failure of reappointment if the actions of a given judge are less than satisfactory to the Department of Justice.

Appellants' objections to the removal and term tenure features of section 1614(a) have been regarded seriously in some quarters. A leading commentator has observed:

> If judicial independence is of vital importance in the states, it is hard to see why it is not equally valuable

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[1]*See* 28 U.S.C. §133 (1976 & Supp. V 1981) (providing for appointment of district judges).

> to the territories. The district judges there try persons for crimes against the United States. They hear civil cases in which the United States is a party. They should be able to decide such cases fearlessly and impartially, without being dependent upon the Department of Justice for their continued tenure. Unfortunately instances are not unknown of territorial judges who have not been reappointed, under circumstances where it appears that they have been denied reappointment because of decisions displeasing to the appointing authority. So long as these judges have limited tenure, the possibility of such abuse, or apparent abuse, will persist. The granting to these judges of tenure during good behavior, as was recently done for Puerto Rico, would be desirable.

(Footnotes omitted). C. Wright, Law of Federal Courts §11 at 49 (4th ed. 1983). Even if one were to posit that section 1614(a) is an undesirable statute, it is a long jump to holding that a trial before judges appointed under it violates due process of law. No authority has been called to our attention holding that defects in the process whereby judges may be removed or reappointed can be relied upon by litigants to challenge the capacity of those judges to render decisions satisfying due process. Indeed it seems likely that such a doctrine would undermine the authority of many state courts to function. Thus we reject appellants' contention that the recognized defects in section 1614(a) are of due process dimensions for litigants.

III.

Appellants' remaining contentions need not long detain us. Both defendants contend that the evidence was insufficient to sustain a finding of guilt on any count. Our examination of the record discloses otherwise. Mr. Canel urges that the court should have granted him a new trial for prej-

udicial joinder. There was no pre-trial motion for a severance, and on this record we cannot hold that a post-verdict denial of a motion for a new trial on this ground was an abuse of discretion. Mr. Canel also contends that a statement taken from him was introduced in evidence in violation of *Massiah v. United States*, 377 U.S. 201 (1964). There were no charges pending against him and no attorney representing him when the statement was given after he was fully warned about his rights. Mr. Figueroa contends that none of the false statements in evidence violated 18 U.S.C. §1001 (1976) because none were made within the jurisdiction of an agency of the United States. *But see* 48 U.S.C. §1599 (1976 & Supp. III 1979) (Inspector General of Interior Department audits accounts of the Government of the Virgin Islands). Finally, Mr. Figueroa urges that he is entitled to a new trial because the government utilized peremptory challenges to exclude persons of Puerto Rican ethnic background from the jury. We decline to change the rule that neither side need justify the use of peremptory challenges.

IV.

The judgments appealed from will therefore be in all respects affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B.

Memorandum Opinion and Order.

In the District Court of the Virgin Islands, Division of St. Thomas/St. John.

United States of America, Plaintiff, vs. Orlando Canel and Jose (Tony) Figueroa, Defendants. Criminal No: 82-72. U.S.C. §§371; 2314; 1343; 1001,2.

CONSPIRACY: TRANSPORTING CHECKS OBTAINED BY FRAUD: WIRE FRAUD: FALSE STATEMENT.

Filed: November 17, 1982.

David V. O'Brien, Judge.

The defendants in this case were originally charged with one conspiracy count and twelve other federal "white collar crimes" arising out of two separate sets of circumstances. The first set of circumstances involved the alleged unauthorized use of work crews and equipment of the Virgin Islands Department of Public Works on property owned by one of the defendants for his personal benefit. The second set of circumstances involved government purchases by defendant Canel, in his capacity as a division head within the Department of Public Works, of three trucks from defendant Figueroa, who falsely represented himself as an administrator of a bankrupt estate in Puerto Rico. Specific acts alleged in the conspiracy count included the use of the telephone for the numerous telephone calls made from the Department of Public Works to Puerto Rico, preparation of various documents to cover-up the fraud, and interstate travel.

All the counts involving the unauthorized use of the government work crews and equipment were dismissed by the Court on defendants' motion for acquittal at the end of the prosecution's case. The jury was left to consider seven of the original thirteen counts dealing with the truck purchases.

At the close of all the evidence defendants renewed their motion of acquittal and it was denied.

Defendant Canel was convicted on all seven counts. Defendant Figueroa was convicted on five of the seven counts. Each was convicted of conspiracy, obtaining money by fraud, use of interstate telephone wires, and making and using false documents. Defendant Canel was also convicted of two additional counts of making and using false documents.

Both defendants filed motions for judgment notwithstanding the verdict or in the alternative for a new trial. The motions will be denied for the reasons stated herein.

I. *JURISDICTION UNDER 18 U.S.C. §§1001, 371*

Defense counsel separately raise and join in each other's motion the question as to whether the defendants could be found guilty under the federal statutes 18 U.S.C. §§1001, and 371 when, they allege, the acts were committed against the Virgin Islands Government. Basically, counsel argue that the transactions the defendants were found guilty of are all against the territory and are not "within the jurisdiction of any department or agency of the United States" nor was the conspiracy committed against the United States, or an agency thereof," as required by those statutes.

This Court does not dispute the fact that the defendants could have been found to have defrauded the Virgin Islands Government under Virgin Islands law. *See* 14 V.I.C. §§551, 843. The Court does not dispute in this case the fact that the Virgin Islands Government, particularly the Department of Public Works, is not the United States Government of a federal agency or department. *See Harris v. Boreham*, 223 F.2d 110, 114-16 (3d Cir. 1956) (V.I. municipality not a federal government department or agency); *Dudley v. Commissioner of Internal Revenue*, 258 F.2d 182 (3d Cir. 1958) (U.S. Tax Court lacked jurisdiction to hear tax deficiency

appeal because notice issued by territorial officer). The Court finds, however, that a violation has been committed against a federal department, the U.S. Department of Interior, as well.

A. *Section 1001 — Counts 10, 11, 12 and 13*

Counts 10, 11, 12 and 13 alleged that the defendants made and used false and fraudulent statements to procure a Disbursement Voucher for $35,000; to justify the "open market" purchase of the dump truck in a letter to the Governor written by defendant Canel; to certify that defendant Figueroa was the vendor of the dump truck in a requisition; and to procure a Government Transportation Request to Puerto Rico. The transactions were all done in violation of 18 U.S.C. §1001 and 2. Section 1001 provides

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The issue, as phrased by counsel for defendant Figueroa, and paraphrased here, is whether the fact that the U.S. Department of Interior has lawful authority to audit the financial affairs of the Virgin Islands Government renders a fraud basically against the Virgin Islands Government an offense against the U.S. Government or one of its agencies or departments. The prosecution, responding in the affirmative, argues that because the fraudulent statements found their way to the federal government comptroller, an agent of the U.S. Department of Interior, as a part of his statutory

auditing functions, the documents and statements made constituted a fraud against the U.S. Department of Interior. The auditing of these records, it is further argued, is a matter "within the jurisdiction" of a federal department, citing to *United States v. Cartwright*, 632 F.2d 1290 (5th Cir. 1980). We agree with the prosecution.

Under section 17 of the Revised Organic Act of 1954 (hereafter the "Act"), 48 U.S.C. §1599, the financial affairs of the Virgin Islands Government are monitored by a government comptroller who is appointed by the Secretary of the U.S. Department of Interior (hereafter the "Secretary") and is under his general supervision. Section 17(a) specifically provides that the government comptroller is not part of any executive department of the Virgin Islands Government (hereafter the "Government"). He is mandated to audit all expenditures of funds pertaining to the Government which includes bringing to the attention of the Secretary of the Interior and the Governor of the Virgin Islands all irregular expenditures of funds. The office and activities of the government comptroller are subject to review by the Comptroller General of the United States. While the government comptroller may perform some territorial functions,[1] he is a federal employee or agent of the U.S. Department of Interior. *See Harris v. United States*, 125 F. Supp. 536, 541 (D.V.I. 1954) (Superintendent of Public Works for the municipality of St. Thomas and St. John, appointed and paid by the Secretary, was a "federal employee" under the Federal Tort Claims Act although he performed both territorial and federal functions).

Cartwright involves a case where defendant was convicted under §1001 for submitting false statements to a

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[1]*See* 48 U.S. 1405.

lending institution which was a wholly-owned subsidiary of a federally-insured savings and loan association. The federal agency had statutory authority to "make examinations" into the institutions it insured "for its protection and the protection of other insured institutions," which authority was extended, in that case, to the wholly-owned subsidiary. Fraudulent statements submitted by defendant to the subsidiary were considered "within the jurisdiction" of the federal agency. The U.S. Supreme Court, in discussing the amendment to 18 U.S.C. §80, later renumbered 18 U.S.C. §1001, which added the phrase "within the jurisdiction of any department or agency of the United States," stated:

> The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.

United States v. Gilliland, 312 U.S. 86 93 (1940).

In the present case, the government comptroller has statutory authority to audit the Government's expenditures. The purposes of the government comptroller's auditing activities are to:

> improve the efficiency and economy of programs of the government of the Virgin Islands, and . . . discharge the responsibility incumbent upon the Congress to insure that the substantial Federal revenues which are covered into the treasury of the government of the Virgin Islands are properly accounted for and audited.

48 U.S.C. §1599(c). The submission of fraudulent documents would and does interfere with the lawful functions of the government comptroller, which includes accounting for and auditing the federal revenues as well as the territorial revenues. The submission of these documents, therefore, does involve matters "within the jurisdiction" of the U.S. Department of Interior.

The defendants cite to *Ebeling v. United States*, 248 F.2d 429 (8th Cir.), *cert. denied, sub nom., Emerlin v. United States*, 355 U.S. 907 (1957), a case which the Third Circuit cited as controlling in *United States v. Waters*, 457 F.2d 805 (3d Cir. 1972), as controlling in the present case. They argue that the prosecution was required to prove that the defendants knew of the federal involvement with the Department of Public Works. We disagree. *Ebeling* may very well stand for the proposition that where a federal agency is peripherally involved, proof is required that the defendants had actual knowledge of federal involvement. The present case is more akin, however, to cases where a federal agency has an interest in protecting its authorized functions and proof of knowledge of federal involvement is not necessary. *Cartwright, supra, United States v. Standford*, 589 F.2d 285, 297 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979). Even the court in *Ebeling* acknowledges that a broader standard applies in cases involving federal regulation:

> If the false writing or document constitutes a legally required record under a statute in some regulatory field, there may be an even broader liability under the section but that aspect is not here involved and calls for no consideration.

248 F.2d at 434. *See also Bryson v. United States*, 396 U.S. 64, 71 (1969) (statutory basis for federal agency's request for information provides jurisdiction enough to punish fraudulent statements under §1001).

Even if we adopt defendants' application of *Ebeling*, their argument still fails. Defendant Canel, at the time of the transactions, was the Director of the Division of Roads and Highways in the Department of Public Works in the Government. As head of this division, one of his duties was to procure equipment like in issue here and this Court finds it difficult not to impute knowledge to Canel of the federal

auditing procedures for expenditures made in his division which would eventually be brought to the attention of the government comptroller. Although the prosecution did not directly bring this point out, the jury had before it the character testimony of Gordon Finch, the Commissioner of Public Works while defendant Canel was head of the Division of Roads and Highways. Mr. Finch stated that Canel was the most efficient of his directors and if he were appointed again as Commissioner he would reappoint Canel to the same position. An efficient director of a government division surely would know the administrative process regarding division expenditures. The evidence presented was sufficient to infer that defendant Canel knew that the false statements would be brought to the attention of the government auditor, a federal agent, in the process of auditing the division's expenditures.

The above analysis applies as well to defendant Figueroa. As an aider and abettor, he is liable as a principal. 18 U.S.C. §2. *See also United States v. Catena*, 500 F.2d 1319, 1323 (3d Cir.), *cert. denied*, 419 U.S. 1047 (1974), (person guilty of fraud against agent of U.S. even if use innocent intermediary under 18 U.S.C. §2(b) and §287, a statute narrower on its face than §1001).[2]

B. *Section 371 — Count 1*

Count one alleges conspiracy to defraud the United States under 18 U.S.C. §371 by using interstate wire communications and transporting in interstate commerce money or

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[2]Even if *Ebeling* were applicable to this case, the Court is not inclined to give it much weight. *Ebeling* is cited in *Waters, supra*, as controlling without discussion of the facts or the legal principles involved. The major contention was that the alleged false records were directed to the Urban League of Philadelphia, a contractor with the U.S. Department of Labor, and not government agency. The Third Circuit held that the appeal was without merit and upheld the conviction. This Court doubts that that case is factually similar to the present case.

property in violation of 18 U.S.C. §§1343 and 2314. The alleged conspiracy also included the misrepresentation to "public officials" regarding the role of defendant Figueroa as a bankruptcy administrator, the savings for purchasing the three trucks through Mr. Figueroa, and the cover-up.

The United States Supreme Court, in a case involving 18 U.S.C. §88 (1940 ed.), of which that section and 18 U.S.C. §294 were consolidated into §371, stated:

> The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government.

Haas v. Henkel, 216 U.S. 462, 479 (1909) *quoted in United States v. Winkle*, 587 F. 2d 705, 708 (5th Cir. 1979). The counts of which the defendants were convicted were based on facts, especially the cover-up, which impaired or obstructed the lawful function of the U.S. Department of Interior through the government comptroller which was to accurately audit the Department of Public Works and recommend corrective action where necessary and to account for Department expenditures. Arguments expressed regarding §1001 apply here as well.

II. *COMPOSITION OF THE JURY*

Defendants also questioned the process of selection of the jury and the alleged bias of one juror in particular. Counsel for defendant Canel filed two affidavits describing the behavior of Juror No. 8, Palmira Benjamin, while in the jury box, as demonstrating a clear bias against the defendants. The affidavit attributes that behavior of bias against government officials to the death of her son three months ago, to her alleged distrust in officials stemming from her alleged belief that there was an official "cover up" regarding her son's recent death.

Counsel for defendant Figueroa makes a broader attack. She alleges that the composition of the jury deprived the defendant of his Sixth Amendment constitutional right "to an impartial jury drawn from a fair cross section of the community." This deprivation came about, she claims, because the prosecutor exercised his peremptory challenges to exclude from the jury all persons of Puerto Rican descent. This insured, she alleges, "that the Puerto Rican defendants in the case would not find among those deciding their fate any persons who identified with them, were sympathetic to them, or who generally considered their presence anything but that of a stranger." Counsel suggests that the prosecutor should not, in the jury selection process, be allowed to frustrate a defendant's right to a representative jury by the exclusion of one element of the community, in this case, persons of Puerto Rican descent.

A. *Canel's Claim of Bias by Juror Benjamin*

A party attacking the integrity of the jury on the ground of a juror's prejudice must prove prejudice by a preponderance of the evidence. *United States v. Riley*, 544 F.2d 237, 242 (5th Cir. 1976), *cert. denied*, 430 U.S. 932 (1977). Defendant Canel's proof consists of an affidavit from Robert L. Wilson, Chief Investigator for the Federal Public Defender's Office. He sat at counsel table for the entire trial and observed Juror Benjamin "suck her teeth constantly"[3] whenever the defense counsel were active, and "make facial expressions of disgust or disbelief by rolling her eyes heavenward or frowning intensely." He also noted that she made remarks to fellow jurors, causing the latter to "snicker aloud". Never had Mr. Wilson, in his thirty years of in-

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[3]This is a local custom which indicates feelings of disgust, anger, disbelief, or imitation.

volvement with the criminal justice system, seen such a hostile juror.

The second affidavit suggests why Juror Benjamin was hostile. It was offered by David H. Jackson, another investigator for the Federal Public Defender, who is a neighbor and friend of Juror Benjamin. He explained that Ms. Benjamin lost a son under unexplained circumstances while stationed with the U.S. Navy aboard an aircraft carrier. He said it was "widely circulated" in the Virgin Islands that there was an official "cover up" of the circumstances surrounding her son's death.

The Court does not consider the two affidavits, taken together, as proof by a preponderance of the evidence that Juror Benjamin entered the jury box prejudiced and predisposed against the defendants. The Court observed the behavior of all the jurors. Ms. Benjamin was alert and sometimes animated, not only when defense counsel was active. The prosecutor was subjected to various looks also which the defense mistakenly thought were directed only to the defendants. Various witnesses received the same treatment, which included prosecution witnesses as well. That she may have been more demonstrative during Canel's testimony was natural, since this was the highlight of the trial. Canel himself shouted, pointed, accused, defended, explained, argued, and gesticulated during both direct and cross-examination. The entire courtroom was alert and alive. All present knew that Canel's hopes for acquittal rested largely on how he presented himself during his own testimony.

The notion that the death of her son, and a "cover up" by federal officials of the circumstances of that death, might have played an important role in creating bias against Canel is out of the question. If Ms. Benjamin had a bias because of a federal "cover up", it would more likely be directed

at the federal prosecutor than at one who was accused by federal authorities. Moreover, since she was a friend and neighbour of investigator Jackson, who was frequently in the courtroom an equally valid suggestion could be made of bias in favor of the defendants for whom that friend worked.

Mere hypothesizing or just plain guessing is not "preponderance of the evidence." Defendant Canel has not met the burden of proof for reversal or acquittal on the above cited grounds.

B. *Jury Composition and Defendant Figueroa's Rights*

The jury ultimately selected to hear the defendants' case consisted entirely of Black persons, ten women and two men, with four alternates, also Black. The prosecutor, with six peremptory challenges, exercised a sufficient number which resulted in the removal of all apparent Puerto Ricans from the jury. The defendants, with twelve peremptory challenges, used a sufficient number which resulted in the elimination of all apparent White persons. Thus, the combined actions of the prosecutor and defense counsel led to the elimination of all Puerto Ricans and White persons, resulting in the all-Black jury which counsel for defendant Figueroa now claims was supposedly "unrepresentative of a fair cross-section of the community." What, apparently, counsel really hoped for was not a "fair cross section of the community", but in reality a jury that *included* Puerto Ricans but *excluded* White persons.

Swain v. Alabama, 380 U.S. 202 (1964) is the dispositive case in this matter. It held that a defendant in a criminal case is not constitutionally entitled to a proportionate number of his race on the trial jury or the jury panels, and that the prosecutor's striking of persons of one race from the jury panel in one particular case, under the peremptory

challenge system, does not constitute denial of equal protection of the laws. To establish there is improper striking of jurors of one race, a defendant must show that the prosecutor's systematic use of peremptory challenges against persons of one race extended over a period of time. *Swain, supra*, 380 U.S. at 227.

Case development since then has refined that view. Of particular significance is *United States v. Newman* 549 F.2d 240 (2d Cir. 1977), where the circuit court reversed the actions of the U.S. District Court judge who ordered an inquiry into why the prosecutor exercised certain permptory challenges against Blacks. The Second Circuit responded:

> As the trial court noted, "the prosecutors honestly believed that the striking of Black veniremen would lessen the risk of bias in favor of the defendant and thereby increase the likelihood of a bias free jury." A prosecutor's opinion that particular veniremen are likely to base their conclusions as jurors on emotional factors such as fear, hate, or sympathy or pity rather than upon the evidence in the case, in the light of the Court's instructions of law, as it is their duty to do, is not an act of invidious racial descrimination.

Newman, supra, 549 F.2d at 249.

Figueroa makes no claim that over a period of time the prosecutors in the Virgin Islands have systematically excluded Puerto Rican veniremen where a Puerto Rican defendant is on trial. Neither the majority nor the dissenters in *Swain, supra*, permitted an inquiry into the use of the peremptory challenge where such a systematic exclusion was not in practice.

The mere act of a prosecutor in exercising his peremptory challenges to exclude persons of the same race as defendants, does not in and of itself leave that exercise open to inquiry. *United States v. Greene*, 626 F.2d 75, 76 (8th Cir)

cert. denied 449 U.S. 876 (1980), *citing* to *Swain supra*.

Inherent in defendant Figueroa's claim is the suggestion that simply because all members of the jury were Black, and the defendants were Puerto Ricans, the defendants could not, and did not receive a fair trial. To respond to that, this Court adopts the precise language of the Second Circuit in *Newman, supra*, 549 F.2d at 250, note:

> Blacks are the major victims of wrongdoers and it is unlikely that they hesitate to convict where the case warrants it. All of the members of this court, hearing the present case, have served more than a decade as judges of the United States District Court for the District of Connecticut. It has been our experience that Black persons, summoned and drawn for jury panels in that court, have been excellent jurors and have shown no predilection to favor or harm any group, class or kind of persons but have judged the facts on the evidence presented in court in the light of the court's charge.

This has been the experience of this Court both as an advocate and as a judge, in this jurisdiction. This Court also joins with the Second Circuit in the warning of the dangers of forcing inquiry into the reasons behind the exercise of peremptory challenges:

> The right to peremptory challenges is of great importance, both to the Government and to the defendants—but mostly to the defendants, because they are personally involved in the result of the trial and for this reason usually have more of the peremptory challenges than the Government. These challenges provide one of the most effective assurances that a party will have a fair and impartial jury. If, for example, a defendant knows or has a strong suspicion that a particular venireman is hostile to him or believes the venireman has strong or militant views which would make it unlikely, in

> spite of the court's instructions, that the venireman would give fair and impartial consideration to the case, and yet the defendant does not have available sufficient evidence to prove these disqualifications on a challenge for cause, he can solve the problem with a peremptory challenge. The same considerations apply to a plaintiff or a prosecutor. Once, however, a plaintiff or prosecutor is required to submit to interrogation concerning his reasons for making a peremptory challenge, it will probably not be long before defendants will be required to do likewise. This, in all likelihood, would spell the end of premptory challenges; and Blacks and other recognizable minority groups would thereby suffer a major loss in the removal of one of the greatest safeguards the law has provided for a fair trial.

Newman, supra, 549 F.2d at 250. Counsel's citation to *People v. Payne,* 50 *U.S.L.W.* 2748, an intermediate Illinois state court opinion, cannot outweigh the cases cited herein. Counsel urges that the rule that no reason need be given for a permptory challenge, must give way to a constitutional imperative. That stance is rejected here by this Court for the reasons cited above.

Counsel has shown nothing beyond the prosecutor's exercise of his peremptory challenges which would give rise to any suggestion that defendant Figueroa was deprived of his constitutional rights. The jury, which heard this case sifted through extensive evidence, demonstrated the care it gave to each defendant's case, by finding defendant Figueroa guilty on certain counts, and acquitting him on others. Defendant Figueroa's argument cannot stand.

III. *JURISDICTION: TERRITORIAL COURT JURISDICTION OVER ARTICLE III SUBJECT MATTER*

Counsel for defendant Figueroa, joined in by counsel for defendant Canel has submitted a supplemental memorandum arguing a novel issue as to whether this Court has jurisdic-

tion to preside over this case where only federal crimes are charged. Counsel argues that applying the rationale of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co. et al.* ... U.S. ..., 50 U.S.L.W. 4892, this Court as an Article I court does not have jurisdiction to hear cases which are generally heard in Article III courts. More specifically, counsel argues that this Court, because it serves a limited term, subject to political appointment every eight years, deprives her client of his due process right to have his case heard before an Article III court.

Northern Pipeline, held that the federal statute expanding the powers of bankruptcy judges was in violation of Article III of the Constitution. The plurality opinion was written by Justice Brennan, and was joined by three other justices. We are of the opinion, however, that *American Insurance Co. v. Canter*, 26 U.S. (1 Ret.) 242 (1828) is controlling. That case involved a question of whether a Florida territorial court had jurisdiction over an admiralty matter which was generally within the exclusive jurisdiction of Article III courts. Similar objections were raised regarding a territorial judge's limited tenureship. The Court held that although admiralty jurisdiction is exclusive in Article III courts in states, the same limitation did not extend to territories. 26 U.S. (1 Ret.) at 257. *See also Palmore v. United States*, 411 U.S. 389, 403 (1972) (*American Insurance, Co.*, is still viable law); *Government of the Canal Zone v. Scott*, 502 F.2d 566 (5th Cir. 1974). This Court, therefore, has jurisdiction to preside over this case involving the federal criminal statutes of which the defendants have been convicted despite the fact that we are not an Article III court.

CONCLUSION

The defendants have raised several other issues in their respective motions. They do not, however, have merit and will not be discussed. None of the issues discussed in this opinion warrant a judgment of acquittal or a new trial.[4] The issue of whether the crimes alleged actually come under the heading of "federal crimes" is difficult and validly asserted by the defendants. But the Court is convinced that under the unique relationship of the Department of the Interior to the U.S. Virgin Islands embodied in Section 17 of the Revised Organic Act of 1954, the appropriate counts of the information do constitute federal crimes under 18 U.S.C. §1001.

Accordingly, the motions will be denied.

DATED this 17th day of November, 1982.

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[4]The issues raised by counsel as to the status of the District Court of the Virgin Islands in performance of functions identical to Article III judges is novel. In many ways the Court might ardently hope it is successfully pursued, for this could lead to lifetime status for the judges of this Court. Precedent, however, suggests otherwise. In *Northern Pipeline, supra*, at 4896, the Supreme Court discusses territorial courts, and recognizes congressional authority to grant them jurisdiction over matters usually reserved only to Article III courts.

Order Amending Opinion.

In the District Court of the Virgin Islands, Division of St. Thomas and St. John.

United States of America, Plaintiff, vs. Orlando Canel and Jose (Tony) Figueroa, Defendants. Criminal No: 82-72 U.S.C. §§371; 2314; 1343; 1001,2.

CONSPIRACY: TRANSPORTING CHECKS OBTAINED BY FRAUD: WIRE FRAUD: FALSE STATEMENT.

Filed: November 24, 1982.

DAVID V. O'BRIEN, Judge.

It is ORDERED that the slip opinion in the above-entitled matter be amended as follows:

1. The seventh line in the first full paragraph on page 3 shall be corrected to read: "*See Harris v. Boreham*, 233 F.2d"

2. The ninth line in the first full paragraph on page 3 shall be amended to read: "*see also Dudley v. Commissioner of*"

3. The second line in the second full paragraph on page 3 is amended to read: "false and fraudulent statements to purchase two tractor-trailer trucks and a dump truck, more specifically: to procure a"

4. Footnote 1 on page 4 is amended to read: "*See* 48 U.S.C. §1405v."

5. The twentieth line in the first full paragraph on p. 5 is corrected to read "*United States v. Gilliland*, 312 U.S. 86, 93 (1940)."

6. The second line in the first full paragraph is corrected to read: "*sub nom., Emerling v.*" on page 6.

7. The following portion of line seven of the third paragraph on page 8 is deleted: "to the death of her son three months ago,"

8. Footnote 3 on page 9 is corrected to read: "anger, disbelief, or irritation."

9. Lines four, five and six of the last paragraph on page 12 is corrected to read: "*United States v. Greene*, 626 F.2d 75, 76 (8th Cir.), *cert denied*, 449 U.S. 876 (1980), *citing to Swain, supra.*"

10. Line six of the first paragraph on page 13 is corrected to read: "Circuit in *Newman, supra*, 549 F.2d at 250, n. 8:"

11. Line five in the first paragraph on page 14 is corrected to read: "*Newman, supra*, 549 F.2d at 250, n. 8."

12. In lines 4 and 12 in the first paragraph on page 15, the citation to *American Insurance Co. v. Canter* is corrected to read: "26 U.S. (1 Pet.)"

13. Line 5 in the only paragraph on page 16 is amended to read: "federal crimes under 18 U.S.C. §§1001, 2, and 371.

DATED this 24th day of November, 1982.

ENTER:
/s/ David V. O'Brien
DAVID V. O'BRIEN, Judge

A T T E S T:
GEOFFREY BARNARD
Clerk of the Court
By /s/ Frank Heckman
Deputy Clerk

APPENDIX C.

Judgment.

United States Court of Appeals For the Third Circuit.

Nos 83-3003/4.

United States of America vs. Orlando Canel, Appellant in No. 83-3003. Jose Figueroa, Appellant in No. 83-3004. (D. C. Crim. Nos. 82-72-01 and 82-72-02).

On Appeal From the District Court of the Virgin Islands, Division of St. Thomas and St. John.

Present: GIBBONS, SLOVITER, and BECKER, *Circuit Judges*.

These causes came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John and were argued by counsel April 28, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered November 15, 1982 be, and the same are hereby affirmed.

ATTEST:
/s/ Sally Mrvos
Clerk

May 31, 1983

Certified as a true copy and issued in lieu
of a formal mandate on July 1, 1983.

Test:
/s/ M. Elizabeth Ferguson
Chief Deputy Clerk,
United States Court of Appeals,
for the Third Circuit

APPENDIX D.

Judgment and Commitment.

In the District Court of the Virgin Islands, Division of St. Thomas and St. John.

United States of America, Plaintiff vs. Jose (Tony) Figueroa, Defendant. Criminal No. 82/72.

CONSPIRACY; TRANSPORTING CHECKS OBTAINED BY FRAUD; WIRE FRAUD; FALSE STATEMENT.

On this 10th day of November, 1982 came the attorney for the government and the defendant appeared in person and with counsel, Maria T. Hodge, Esquire.

It is ADJUDGED that the defendant has been convicted upon his plea of Not Guilty of the offense of Conspiracy, Transporting Checks Obtained by Fraud, Wire Fraud and False Statement, which plea was duly recorded, a jury trial was demanded and on September 20, 1982, the jury trial commenced and concluded on September 24, 1982. The defendant was found GUILTY of the offense of Conspiracy, Count (I); Transporting Checks Obtained by Fraud, Count (II); Fraud by Wire, Count (III); False Statement, Count (X) and False Statement, Count (XIII) as charged. The court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant is guilty as charged and convicted.

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of ninety (90) days, on Counts I and III concurrently.

Upon release from incarceration, defendant is directed to participate in a program of community service at the St.

Croix Community Health Center for a period of nine (9) months, as part of a term of supervised probation for two (2) years. Defendant is toprovide forth (40) hours per week of community service under the direction of the Department of Health, less the usual holidays and time off given to all employees of that department. He is to serve in a capacity of orderly or kitchen helper or similar work, without recompense.

While the defendant is on probation during his community service, he is to reside in St. Croix in a residence approved by the Federal Office of Probation or, if such a residence cannot be found, he is to reside at Golden Grove Correcrional Facility. With the permission of the probation officer, he may make periodic trips to Puerto Rico or other locations.

The imposition of this sentence is stayed until 9 a.m. November 23, 1982, at which time the defendant is to report to the office of the U.S. Marshal on St. Croix, or at a location designated by the U.S. Marshal for commencement of his term of incarceration.

In the event an appeal is filed on behalf of the defendant, the sentence herein is stayed pending final disposition of the appeal.

In addition to any other sentence imposed hereunder, the defendant is hereby fine the sum of $10,000 on Count (II), $10,000 on Count (X) and $10,000 on Count (XIII), a total cumulative fine of $30,000.

It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

Dated: Novemver 15, 1982.

ENTER:
/s/ David V. O'Brien
DAVID V. O'BRIEN
JUdge

ATTEST:
GEOFFREY W. BARNARD
Clerk of the Court
By: /s/ Alice A. Maynard
Alice A. Maynard
Deputy Clerk

APPENDIX E.

Sur Petition for Rehearing.

United States Court of Appeals for the Third Circuit.

United States of America v. Jose Figueroa, Appellant. (D. C. Criminal No. 82-72-02). No. 83-3004.

Present: SEITZ, *Chief Judge*, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ Gibbons
Judge

Dated: June 23, 1983.